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1939

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IN THE

CHARLES ELMORE CHURLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

v.

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT

JOSEPH M. HARTFIELD,
Counsel for Respondent.

JOSEPH A. BENNETT,
CHARLES W. DIBBELL,
HENRY M. MARX,
of Counsel.

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UNITED STATES REALTY AND
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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the Circuit Court of Appeals is reported at 108 F. (2d) 794, and is also contained in the record (R. 420).

The District Court orders (R. 142, 149, 151) from which the appeals were taken to the Circuit Court of Appeals, were entered July 28, 1939 and are unreported. These orders were in effect formal entries of the District Court rulings expressed orally in open court on July 27, 1939 (R. 336-339).

Jurisdiction of this Court

This Court on April 1, 1940 assumed jurisdiction of this proceeding by granting the petition of the Securities and Exchange Commission for a writ of certiorari. Juris-

diction was claimed under Section 240(a) of the Judicial Code [Title 28, U. S. C., Sec. 347(a)].

The Questions Presented

It is submitted that there is only a single issue presented:

Must a District Court refuse to assume jurisdiction over a proceeding for an arrangement under Chapter XI of the Bankruptcy Act, solely because the debtor is a corporation which has securities outstanding in the hands of the public?

However, since the Commission in its brief has argued the questions of its right to intervene and appeal, we shall also discuss these issues, but briefly.¹

Petitioner's question 2 (Petitioner's Brief, p. 2), relating to the fairness, equitability and feasibility of the proposed arrangement, is not properly in issue at this time, and was not in issue in the Circuit Court of Appeals, inasmuch as that question can be raised on appeal only after the District Court has itself considered the matter. The District Court has not yet confirmed or refused to confirm any arrangement.

¹As a practical matter, in this particular proceeding the questions of intervention and right of appeal are now academic. The purpose of intervention was solely to challenge the jurisdiction of the District Court by appropriate motion, and to obtain the right to appeal from an order denying the Commission's motion. (R. 133, 143, 366). By having the jurisdictional question considered fully on the merits both by the Circuit Court of Appeals and by this Court, the Commission has obtained the full object of its intervention and appeal. Accordingly, it is not essential for this Court to decide whether the Commission had a right to intervene and appeal. The Debtor believes, however, that the court below was correct in holding that the Commission had no right of intervention and no right to appeal.

The order of the District Court referring the proceeding to a referee, although technically appealed from, is not really in issue. It seems clear that if the District Court properly assumed jurisdiction of this Chapter XI proceeding, the order of reference was proper. (Bankruptcy Act, Section 331.)

The Statutes Involved

The questions presented on this petition involve primarily Chapters X and XI of the Bankruptcy Act (52 Stat. 840, Sections 101-399; Title 11 U. S. C. Secs. 501-799). Petitioner states (Petitioner's Brief, p. 3) that copies of Chapters X and XI have been filed in their entirety with the Clerk of this Court; and the Debtor takes the liberty of referring to such statutes as so filed.

Statement of the Case

This is a proceeding instituted by the Debtor on May 31, 1939 for an arrangement under Chapter XI of the Bankruptcy Act, which is now pending in the United States District Court for the Southern District of New York. The Debtor is a New Jersey corporation engaged in the business of owning and operating real estate, with substantial assets and liabilities, and with stock publicly held by some 7,000 stockholders and listed on the New York Stock Exchange (R. 6, 7, 134).

The factual background of the proceeding may be set forth briefly as follows:

On June 1, 1919, the Debtor's subsidiary, Trinity Buildings Corporation of New York (hereinafter sometimes referred to as Trinity) executed and delivered to Guaranty Trust Company of New York as Mortgagee its bond in the amount of \$7,000,000 maturing June 1, 1939, secured by a first mortgage covering two New York City office buildings in the financial district (R. 7, 30). Share certificates in the bond and mortgage were issued by the Mortgagee, and the Debtor executed and delivered to the Mortgagee its guarantee of the principal, interest and sinking fund payments due under said bond and mortgage (R. 7). Although the bond and mortgage constitute secured indebtedness, the guarantee was and is a wholly unsecured obligation. The share certificates were sold to

the public, and the principal amount thereof outstanding has been reduced to \$3,710,500 by operation of the sinking fund (R. 7) and are held by some 900 holders (R. 10).

With the impending maturity of the aforesaid bond and mortgage and guarantee, the Debtor and Trinity jointly proposed to holders of the share certificates a Modification Plan and Arrangement, dated March 15, 1939, and subsequently proposed an Amended Modification Plan and Arrangement, dated May 1, 1939 (R. 9).

On May 31, 1939 the Debtor filed with the United States District Court for the Southern District of New York its petition for an arrangement under Chapter XI of the Bankruptcy Act (R. 6), and proposed as an arrangement the aforesaid Amended Modification Plan and Arrangement dated May 1, 1939 (annexed to the Petition as Exhibit B, R. 30-63). The arrangement provided for a modification and extension of the Debtor's above mentioned unsecured guarantee of the bond and mortgage of Trinity maturing June 1, 1939 and for the payment by the Debtor of all its other debts, secured and unsecured, as they matured (R. 8, 9).² Under this arrangement, provision was made for payment in full of the principal of the share certificates and for substantially full payment of interest before stockholders are entitled to receive anything.

Thus, the proposed arrangement affects only unsecured indebtedness of the Debtor.

The subsequent progress of the proceeding to the date of the decisions of the court below appealed from, as shown by the various material orders and petitions, motions and other pleadings, is set forth in the record, and a summary

²The Amended Modification Plan and Arrangement provided for a similar modification of Trinity's mortgage indebtedness, and in connection therewith provided for institution of proceedings in the New York Supreme Court under the New York Burchill Act (N. Y. Real Property Law, Secs. 121-123). The Plan and Arrangement of May 1, 1939 has now been amended.

thereof is contained in the Statement Under Rule 13 (R. 1-5).

The proceeding is now pending before a Referee. As stated above, the Debtor has submitted certain modifications of the proposed arrangement.³

In connection with the intervention of the Commission, the Debtor wishes to point out that it never objected to the Commission appearing in the District Court proceeding as an *amicus curiae* for the purpose of advising the Court on the arrangement (R. 314-316). The District Court Judge expressly stated that he was glad to have the Commission appear at all times for the purpose of advising him and that he would recommend that the Referee adopt the same attitude (R. 360-1). Accordingly, it is clear that no attempt was ever made by anyone to prevent the District Court from having the "informed, independent judgment" which is emphasized by the Commission in its brief (Petitioner's Brief, p. 20).

Before concluding our statement of facts we wish to emphasize that the Commission has asserted (R. 136-137, 325-327) that, if no securities of the Debtor were publicly held, Chapter XI would be available to it in the case at bar, but since securities of the Debtor are publicly held (although

³We submit that the factual arguments as to the financial condition of the Debtor and of Trinity are irrelevant. However, we wish to emphasize that the Debtor is not insolvent in the bankruptcy sense even considering its contingent liability on the guarantee at the full face amount thereof. An officer of the Debtor testified that as of June 1, 1939 its assets were worth \$7,076,515.92 (R. 226). This figure was based upon including the Debtor's interest in Trinity at no value for the reason that it was the officer's opinion that the Debtor could not realize anything on that investment at this time (R. 190). This estimate was, of course, based upon offsetting the value of the Trinity buildings against the amount of the Debtor's guarantee of the Trinity mortgage. The fair market value of the mortgaged premises of Trinity is believed to be well in excess of the amount of the mortgage (and guarantee) (R. 32). Accordingly, if the value of the Debtor's interest in Trinity is considered as zero, the amount of the guarantee cannot be added to the liabilities of the Debtor. The total amount of the Debtor's liabilities as of June 1, 1939 was \$5,476,500 (R. 228) and, therefore, the Debtor is solvent.

no such provision or inference is found in the statute) the Debtor should be forced to institute the unnecessary, expensive, and lengthy proceeding outlined under Chapter X of the Bankruptcy Act. The Commission in short wishes to force the Debtor to effect a complete reorganization rather than permit it to employ a remedy expressly made available by the Act, to effect an arrangement, namely, a composition with one class of its unsecured creditors.

SUMMARY OF ARGUMENT

I.

The Commission contends that a corporation with securities outstanding in the hands of the public cannot proceed under Chapter XI. It is submitted that this conclusion is clearly erroneous, inasmuch as any corporation which can become a bankrupt may by the express terms of the statute institute a proceeding under Chapter XI, which contains no requirement that the debtor's securities shall not be publicly held. The statute is entirely reasonable and is so clear and unambiguous that the courts are powerless to enlarge or modify its meaning under the guise of a "construction" thereof. Under the provisions of the Act the Debtor could not file a petition under Chapter X unless it could affirmatively show that it could not obtain relief under Chapter XI (Sections 130, 146, 147).

Even if this were a proper case for "construction," neither from the testimony before the Congressional Committees which considered the Chandler Bill, nor in the Committee Reports, nor from the factual background and historical derivation of Chapter XI, nor from the structure of the Bankruptcy Act, can there be found evidence of any intent of Congress to prohibit corporations with publicly held securities from proceeding under Chapter XI. In fact the evidence is to the contrary.

II.

The fairness, equitability and feasibility of any arrangement is not properly in issue at this time, inasmuch as the District Court has not yet confirmed or refused to confirm any arrangement.

III.

It is clear that this Debtor can propose an arrangement which meets the requirements of Chapter XI. The arrangement originally filed, which is to so great an extent the object of the Commission's objections, has been amended in substantial respects and is no longer even before the District Court.

We submit that *Northern Pacific Railway Co. v. Boyd*⁴ and *Case v. Los Angeles Lumber Products Co., Ltd.*⁵ do not apply to a proceeding instituted under Chapter XI for a settlement of unsecured debts. The use of the phrase "fair and equitable" in both Chapters X and XI is not significant, since the same words may have different meanings in different parts of the same statute. That phrase is employed in all the debtor relief chapters of the Bankruptcy Act, and it is obvious that it cannot have the meaning ascribed to it in the *Boyd* and *Los Angeles* cases in chapters such as Chapter XIII, which applies to compositions and extensions of indebtedness of wage earners. However, even if such doctrine were held to be applicable, it is clear that an arrangement which is fair and equitable thereunder can be proposed by the Debtor in this proceeding.

IV.

The Securities and Exchange Commission has no power or authority to intervene in a proceeding under Chapter XI even with the permission of the Court. The Commission is

⁴ 228 U. S. 482 (1913).

⁵ 308 U. S. 106 (Nov. 6, 1939).

a statutory body with limited authority and no statute authorizes its participation in a Chapter XI proceeding. Such participation is ultra vires the Commission. Furthermore, the Commission is not entitled to intervene either as of right or by permission of the Court within Rule 24 of the Federal Rules of Civil Procedure.

V.

The Commission has no status to appeal from the orders of the District Court. Chapter XI does not authorize such an appeal and Chapter X expressly denies it in an analogous situation. Furthermore, the Commission is not a proper party to appeal within Sections 24 and 25 of the Bankruptcy Act or within the general principles requiring an appellant to have a real interest in the proceeding.

I.

UNDER THE EXPRESS TERMS OF THE STATUTE, ANY CORPORATION WHICH CAN BECOME A BANK- RUPT MAY PROPOSE AN ARRANGEMENT UNDER CHAPTER XI.

There is no ambiguity whatever in the jurisdictional requirements set forth in Chapter XI.

Section 306(3) defines a "debtor" as any person who could become a bankrupt, and Section 306(1) defines an "arrangement" as a plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. Section 1(23) provides that "persons" shall include corporations, and Section 4 provides that any person except a municipal, railroad, insurance, or banking corporation or a building and loan association may become a bankrupt.

Sections 322 and 323 authorize a debtor wishing to effect an arrangement to file a petition setting forth the proposed arrangement. The arrangement must modify or

alter the rights of unsecured creditors generally or of some class of them (Section 356).

That the Debtor is entitled, under Section 4 of the Bankruptcy Act, to become a bankrupt, has not been questioned and is not open to argument. Accordingly, the Commission admits that the statute, read "literally", permitted the Debtor to proceed under Chapter XI (Petitioner's Brief, p. 13).

The omission of any restriction on the types of corporate debtors which may avail themselves of Chapter XI is self-evident and has been the subject of a great deal of discussion.⁶

The fact that Chapter X, which was enacted simultaneously with Chapter XI, contains express classifications of corporations based on size (Ses. 156, 159, 172) and Chapter XI contains no such classification also affords a compelling inference that no classification of different types of corporations was even remotely intended under Chapter XI. However desirable the classification proposed by the Commission might be thought to be, there is no warrant for it in the language or history of the statute.

⁶ Heuston, *Corporate Reorganization under the Chandler Act*, 38 Colum. L. Rev. 1193, at page 1201, note 8; Rostow and Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 Yale L. J. 1334.

Mr. John Gerdes, author of *Gerdes on Corporate Reorganizations* (1936) was a participant in the drafting of the 1938 amendments to the Bankruptcy Act. Speaking at the annual conference of the National Association of Referees in Bankruptcies on August 22, 1938, he was presented with the question: "What is the line of demarcation between proceedings under Chapter X and Chapter XI?" He replied, "Without attempting to go into detail, Chapter XI proceedings are intended for the reorganization of corporations with simple debt structures—reorganizations under which the interests of stockholders and secured creditors are not to be modified or readjusted. If secured claims or stock interests are to be changed without the consent of all of the stockholders and secured creditors, proceedings must be instituted under Chapter X." *Journal of the National Association of Referees in Bankruptcy* (January, 1939, p. 72).

As for the authorities, the decision below is one of first impression in the Circuit Court of Appeals. The only square holding by a District Court other than in this proceeding was in accord with the decision below. *In re Credit Service, Inc.*, 30 F. Supp. 878 (D. Ct. D. Md. 1940). Another District Court in a dictum expressed views which are claimed by the Commission to support its contentions. *In re Reo Motor Car Co.*, 30 F. Supp. 785 (D. Ct. E. D. Mich. 1939).⁷

A. Where a statute is clear and unambiguous the courts may not enlarge and qualify its meaning by construction.

We have shown and the Commission has admitted (Petitioner's Brief, p. 13) that the Bankruptcy Act, read literally, permitted the Debtor to proceed under Chapter XI. We shall show hereinafter that a literal reading also achieves an entirely reasonable result.

The issue in the *Reo* case, however, was whether a Chapter X proceeding which was in the final stages of completion should be transferred to Chapter XI on motion of an obstructionist management group which had originally caused the Chapter X proceedings to be instituted. Furthermore, the *Reo* case is distinguishable from the case at bar because the proposed *Reo* plan provided for a change of capital stock of the debtor, which could be accomplished under Chapter X but not under Chapter XI.

The case of *In re McKesson & Robbins, Inc.*, In Proceedings for Reorganization, No. 72697 (S. D. N. Y.) is also a case where the issue was simply whether the petition had properly been filed under Chapter X. From a consideration of the record in that case, it seems clear that the court did not even inferentially pass upon the issue presented here (See Minutes for Hearing held December 27, 1938). The court in fact emphasized that not the legal, but the "practical" situation (particularly the advisability, under the circumstances of criminal falsification of books which achieved nation-wide publicity, that there be an independent single trustee) called for a Chapter X rather than a Chapter XI proceeding. Furthermore, in that case the falsification of records would be a bar to the discharge of the company as a bankrupt under Section 14 of the Act, and this in turn would prevent the confirmation of an arrangement under Chapter XI (Section 366).

It is a fundamental principle of statutory construction that where there is no ambiguity in the language of a statute, there is no room for construction.

The reasons why the specific terms of a clearly worded statute should be followed without any attempt to "construe" them have been stated in compelling language by this Court in *Palmer v. Massachusetts*, 308 U. S. 79 at p. 83 (Nov. 6, 1939) :

"* * * And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."

In *United States v. Missouri Pacific Railroad Company*, 278 U. S. 269 (1929), this Court, in holding that an order of the Interstate Commerce Commission establishing a through route over the lines of the plaintiff and the connecting lines of another road was beyond the statutory authority of such Commission, stated on pages 277-278:

"* * * The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes.

Construction may not be substituted for legislation. * * *

In *Iselin v. United States*, 270 U. S. 245 (1926) involving the taxability of proceeds of the sale of certain Metropolitan Opera House tickets which Miss Iselin received free as a stockholder of the Opera Corporation, this Court held that the statute did not apply to sale of tickets of the type in question, stating on pages 250-251:

" * * * The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

Wallace v. Cutten, 298 U. S. 229 (1936) involved Section 6(b) of the Grain Futures Act, which authorized a Commission to order all Contract Markets (Produce Exchanges) to refuse trading privileges to any person "who is violating" the act or regulations thereunder, or who "is attempting" to manipulate the market price of grain contrary to the provisions of the Act. The Court held that this section did not apply to *past* violations, which were committed two years before proceedings by the Commission were begun. This result was reached even though Section 6(a) of the Act in providing for the punishment of Contract Markets for violations of the Act, used the phrase "has failed or is failing" to comply with the Act. The opinion of this Court contains the following language at pages 236 and 237:

"The Government argues that, since violations of the reporting requirements by their very nature cannot be detected during the course of commission, the literal construction thus given to Sec. 6(b) renders it impractical and ineffective as a means of dealing with those persons who violate any of

the provisions of the Act or attempt to manipulate the market price of grain. Incidents in the history of the legislation are cited to support the Government's contention. * * *

"It would be inappropriate for us to discuss these, and other, arguments presented. The language of Sec. 6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress."

The principle enunciated in the foregoing cases is by no means confined to criminal and tax statutes, although the Commission has attempted to distinguish *Igeln v. United States* and *Wallace v. Cutten* on this ground. In any event, we may assume that the point of the Commission's attempted distinction of those cases, is the argument that the court used this principle to support a strict construction of a tax or penal statute in favor of the taxpayer or accused person.⁸ However, this Court has also imposed penalties with the statement that, "in penal statutes, as well as in those of a different character, 'if the language be clear, it is conclusive'." *Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).⁹ The following language of the Court at pages 100-101 is also noteworthy, in view of the Commission's argument that an additional qualification must be read into Chapter XI, although not written there, viz. that only a small, privately owned corporation may act under such chapters:

"* * * Nothing can be plainer than that a ship which enters one of our ports has come to the United States; and a passenger on board obviously has come with the ship, and consequently has been

⁸ It should be noted that this same distinction would apply to all except one of the cases cited by the Commission in support of its argument against a literal construction of the Act (Petitioner's Brief, page 14).

⁹ For a case where the principle was enunciated in requiring payment of a tax, see *Helvering v. City Bank Farmers Trust Company, Trustee*, 296 U. S. 85 (1935), *infra* p. 15.

brought by the ship to the United States. And this remains none the less the fact, although the ship continue on her way to a foreign port, and although it was intended that the passenger should go with her, and not be left in the United States. To say that the passenger has not been brought to the United States unless the intent was to leave him here, is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction. * * * *

The Commission argues that, if Chapter XI is not construed so as to exclude publicly-owned corporations from acting thereunder, the provisions of Chapter X will be ineffective and meaningless. However, this type of argument has been rejected by this Court where the statute "expresses an intention reasonably intelligible and plain." *Thompson v. United States*, 246 U. S. 547, 551 (1918). It would have been a simple matter, had Congress so intended, specifically to preclude publicly owned corporations from acting under Chapter XI, and thus to provide for public investors what the Commission terms "the protection of the safeguards" of Chapter X (See Petitioner's Brief, p. 24).

Chapter XI by plain, direct language established a different procedure, remedy, safeguards and relief from those provided for in Chapter X. The Debtor's proceeding meets all jurisdictional requirements of Chapter XI, and the District Court so held in finding the Debtor's original petition properly filed under Section 322 and in the orders from which the Commission has appealed. In addition, it by no means follows that what the Commission calls "necessary machinery" for a reorganization under Chapter X is necessary for an arrangement (composition) under Chapter XI. The machinery which is "necessary" can only be prescribed by Congress.

Where the statute is deemed clear by the Court, express statements in Committee Reports leading to a contrary construction have been disregarded. In *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932) the question was whether the Food and Drugs Act authorized the establishment (by administrative officers) of rules and regulations in respect of weight and measure variations or merely in respect of "tolerances and exemptions." The Court, in holding that the clear and natural meaning of the statute permitted the establishment of regulations for variations as well as for tolerances and exemptions, stated at p. 83:

"Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H.R. 850, 62d Cong., 2d Sess., pp. 2-4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S.R. 1216, 62d Cong., 3d Sess., pp. 2-4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. * * *"

Likewise, an inference from a Committee Report was overridden in view of language in the statute deemed by the Court to be clearly to the contrary, in *Helevering v. City Bank Farmers Trust Company, Trustee*, 296 U. S. 85 (1935):

Of course, essentially the question of whether the Court believes that the statute is so clear as to call for the application of the foregoing principles depends upon the particular statute in question. Statutory construction deals with particular statutes, not theoretical principles. Ac-

cordingly the Commission has cited several cases in its brief where in specific instances this Court refused to make a literal application of a statute when the Court believed that this would nullify the intent and clear purpose of Congress (Petitioner's Brief, pages 13-14).

We agree with the decisions in those cases in view of the clear contrary intent of Congress. Thus, in *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892), the principal case relied on by the Commission, one of the Congressional Reports expressly stated that its interpretation of the bill was in accordance with the interpretation subsequently made by this Court.¹⁰

In the instant case, we submit that there is no evidence whatsoever of any intention of Congress to prohibit the use of Chapter XI by corporations with publicly held securities. For a court so to hold would constitute judicial legislation.

B. There is no evidence of any Congressional intent to prohibit corporations with publicly held securities from proceeding under Chapter XI, but there is evidence to the contrary.

As shown above (pages 10 to 16), the history of legislation may not be invoked where the language of the statute is clear. However, it is submitted that even the legislative history and factual background of Chapter XI do not support the contention of the Commission, but do support that of the Debtor.

In support of this statement we will discuss briefly first, the Congressional proceedings on the Chandler Bill itself, H. R. 8046, consisting of the testimony before the Congressional Committees and the Reports of the House and Senate Committees on that bill; second, the factual conditions existing at the time the bill became law, includ-

¹⁰ Furthermore, in that case this Court found principles of religious freedom at stake and devoted a large portion of its opinion to the religious phase of the case.

ing statements in the reports of investigating committees and agencies which were considered by Congress in enacting the law; and third, the structure of the Act, with a comparison of the various debtor relief sections and their relation to the previously existing sections of the Bankruptcy Act.

The testimony before the Congressional Committees which considered the Chandler Bill.

The testimony of various witnesses before the House Judiciary Committee shows that the Chandler Bill was sponsored by the National Bankruptcy Conference, a more or less informal group consisting of representatives of the American Bar Association, certain local bar associations, referees in bankruptcy, representatives of credit associations and others. In addition the Securities and Exchange Commission sponsored many of the provisions of the Bill. (Hearings before the House Judiciary Committee on H. R. 6439, subsequently reintroduced and reported as H. R. 8046, 75th Cong. 1st Sess., pp. 2-3.)

Testimony with respect to Chapter XI was given by a number of individuals. Most of this testimony referred to the use of Chapter XI by small businesses, corporate and individual. One of the witnesses who made such statements was Mr. W. Randolph Montgomery, General Counsel for the National Association of Credit Men. On several occasions he referred to its use by small businesses. However, (1) he indicated inferentially that one purpose of the new Chapter XI was to *permit* small corporations to adjust their debts so as to relieve the courts of unnecessary Chapter X (77B) proceedings in a way which was not possible under the previous wording of the old composition section, Section 12; and (2) he specifically referred to the fact that Chapter XI would not only be available to large corporations but in certain circumstances would be the only chapter available to them. His

statements on this latter point were made before the Senate Judiciary Committee during public hearings on the Chandler Bill (Hearings Before Subcommittee of Senate Judiciary Committee on H. R. 8046, 75th Cong. 2d Sess., p. 75), and in view of their importance to the present discussion are quoted at length, as follows:

"* * * There is one other matter I would like to bring to your attention. * * * Chapter XI. That is the substitute for the present composition section and for the provisions of section 74, and it is also drawn so as to embrace the type of corporations which need reorganization, but dealing only with unsecured creditors as distinguished from reorganization of its capital structure. There is a provision in that section which requires that the plan of arrangements be filed with the petition. In section 77B the filing of a plan, with the position (sic) is not required, but under chapter XI it is required.

"It seems to me * * * that it would be most unwise to have that rigidly written into the arrangements section. *There are many large corporations which under this bill would not be permitted to go into a corporate reorganization proceeding under chapter X because they are seeking only to adjust unsecured debts. Many of them are enterprises of considerable magnitude and have very large debts.* The problems that confront those corporations at the time they seek relief in the bankruptcy courts are often of such a nature that it would not be possible with the petition to file a plan of arrangement which would eventually commend itself to the corporation and to its creditors." (Emphasis added)

It is submitted that the foregoing is clear evidence of the fact that the Congressional committees were advised that Chapter XI would not only be availed of by large corporations but would in fact be the only remedy available if the only relief sought was an adjustment of unsecured indebtedness. It is also believed that a careful

examination of the entire testimony before both the House and Senate committees shows no indication of any intent to exclude large companies from Chapter XI.

Furthermore, one of the leading witnesses on the new reorganization chapter, Chapter X, in a public address made shortly after the adoption of the Chandler Act, stated that in his opinion the line of demarcation between Chapter X and Chapter XI was whether the corporation desired to make a simple adjustment of unsecured debts or to make a thoroughgoing reorganization of its capital structure (See page 9, footnote 6, *supra*).

The Committee Reports

The question of *limiting* the application of Chapter XI to small closely held corporations is also not referred to in the Committee Reports. The only conceivably pertinent statement in either committee report is that on page 51 of the House Report on H. R. 8046 (H. Rep. No. 1409, 75th Cong., 1st Sess.):

“ * * * The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under Section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12.”

The Senate Report (S. Rep. No. 1916, 75th Cong., 3d Sess.) refers to the House Report but does not otherwise contain any statements on this point.

This quotation is revealing in showing (1) that the Committee had in mind primarily the fact of *permitting* small companies to come under Chapter XI and had no specific intention of *excluding* other companies, and (2) that one of the primary reasons for Chapter XI was to relieve the courts of the burden of hearing unnecessary 77B (Chapter X) proceedings. In fact the clear statement

of the intention of Congress is (Sections 130, 146 and 147) that all corporations which can achieve the desired result through the remedy afforded by Chapter XI *must* proceed under Chapter XI rather than Chapter X.

It is true that the Committee Reports refer to various investigations and reports of Governmental and Congressional investigators which point out defects in corporate reorganizations under equity receivership proceedings and under 77B proceedings. The Commission seeks to draw from this a rather involved inference that all publicly held corporations are required to institute proceedings under Chapter X even when proposing merely an adjustment (composition) of unsecured debts, and not complete reorganization. The conclusions of those investigators were that Chapter X (Section 77B) should be considered a *privilege* which should be available only if the corporation conform to certain requirements. There was never any indication whatever that corporations proposing a composition, which could always have been effected under Section 12, should no longer be permitted to act under its successor, Chapter XI. This would, of course, tend to increase rather than decrease the number of Chapter X proceedings, and it is clear from the Congressional history that it was one of the primary objects of Congress in enacting the Chandler Act to restrict the number of Chapter X proceedings.

The factual background of the Chandler Act

1. Prior to Section 77B

Prior to the enactment in 1934 of Section 77B of the Bankruptcy Act, a corporation which desired to effect an adjustment of its indebtedness had (without liquidation in straight bankruptcy) two principal choices. If it were insolvent in the bankruptcy sense, it could propose a composition under Section 12 of the Bankruptcy Act. If it were insolvent only in the equity sense, it could, subject

to various technical restrictions, reorganize through an equity receivership (usually instituted in the federal courts) and a sale of assets thereunder, by foreclosure or otherwise. It also had other remedies and reliefs available, e. g., state court equity receivership and state statutory receivership (or readjustment proceedings (see, *infra*, p. 26).

The difficulties of proposing a composition in bankruptcy were pointed out in the report of Solicitor General Thacher submitted to Congress in 1932^{10A}, which is the first of the reports of investigators referred to in the Congressional reports on the Chandler Bill. Essentially the chief difficulties were two, first, that a corporation had to be insolvent in the bankruptcy sense and, second, that Section 12 did not authorize the issuance of stock or other securities in connection with the composition.¹¹ Accordingly, the Solicitor General recommended the adoption of an amendment to the Bankruptcy Act so as to permit corporations, whether insolvent in the bankruptcy sense or in the equity sense, to reorganize in a manner so that new securities could be issued. A suggested form of bill was submitted and this bill with amendments was subsequently enacted as Section 77B. The Solicitor General referred to the use of Section 77B by large publicly held corporations. However, he made no recommendation that Section 77B be the only remedy available to such corporations and even after Section 77B was enacted, Section 12 remained in the Act unchanged and available to all debtors, individual and corporate. (All other remedies referred to above also remained available.)

2. ***Under Section 77B***

Many small corporations, apparently in order to avoid the stigma of bankruptcy, proceeded under Section 77B

^{10A} Report to the President on the Bankruptcy Act and Its Administration (S. Doc. No. 65, 72nd Cong., 1st Sess.).

¹¹ These difficulties were also pointed out in the Report of the Counsel to the Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings (See *infra* p. 22).

when the relief sought was merely a composition, such as could have been effected under Section 12. It is a matter of common knowledge that the courts were overburdened with these small proceedings, and the problem was examined, *inter alia*, by the Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings.

Counsel for such Committee prepared a report which was submitted to Congress. (S. Doc. No. 268, 74th Cong., 2d Sess., especially pages 1-17). This report made certain recommendations. To understand them, one must recognize that they were designed primarily to restrict the number of 77B proceedings. Counsel's viewpoint was that Section 77B (Chapter X) was a *privilege*, and that as a privilege its use should be limited. The quotations on pages 29 and 30 of Petitioner's Brief must be read with this in mind.

Furthermore, this report recommends that the primary line of demarcation be based upon a standard of insolvency. If a corporation were insolvent in the bankruptcy sense, it was to be required to act under Section 12. If the corporation were insolvent only in the equity sense, it was to be permitted (have the privilege) to act under Section 77B. The primary insolvency standard was to be qualified by a secondary standard, namely, that if the securities were publicly held the corporation would be permitted to act under Section 77B even though insolvent in the bankruptcy sense. A careful reading of the conclusions of Committee counsel clearly indicates that he did not have in mind *compelling* publicly held corporations to go under Section 77B, but rather that such corporations should have a *privilege* to do so even if insolvent in the bankruptcy sense, while smaller corporations could do this only if merely insolvent in the equity sense. This clearly emphasizes that in his opinion all corporations, whether publicly owned or not, should act under Section 12 if possible.

It should also be noted that Committee counsel in recommending a secondary standard of availability of the

privilege of Section 77B, namely that the corporation be publicly owned, specifically pointed out that any such standard would necessarily require incorporation of a definition of "public" or "publicly owned". There is, of course, no such standard expressed in the Act as adopted, nor does the Act contain any such definition.

The third of the reports recited in the Committee Report on the Chandler Bill as containing evidence upon which the amendments of the bill were proposed is the Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees. Its recommendations and conclusions are contained at pages 897 et seq. of Part I of this Report. The Report is, in general, subject to the same comments as made above, namely, that it nowhere recommends that the scope of Section 77B (Chapter X) be enlarged to include *mandatorily* companies proposing compositions which formerly could be effected under Section 12.

It is clear, therefore, that at the time the Chandler Bill was enacted, one of the primary evils to be corrected was the large number of compositions effected in 77B proceedings which should have been effected under Section 12, or could have been if Section 12 were amended so as to provide for issuance of new securities as is the case in Chapter XI (Section 306 (2)).

The structure of the Act

The Act as drawn established a line of demarcation between Chapter X and Chapter XI proceedings which is clear, reasonable and remedies one of the important evils which was under consideration by Congress, namely, to restrict unnecessary Section 77B (Chapter X) proceedings and to differentiate between a *reorganization* and a *composition*.

The line of demarcation, in the express words of the statute, is whether the corporation is proposing a simple debt arrangement, viz. an arrangement merely with respect to its unsecured indebtedness, or is proposing a complete reorganization of its capital structure.¹² If a corporation proposes to adjust merely its unsecured indebtedness, it not only is permitted to act under Chapter XI, but it is required to do so (Sections 130, 146 and 147). Thus, if a corporation is proposing to affect only its unsecured indebtedness it does not act in good faith if it files under Chapter X (Section 146), and the Court must either dismiss the Chapter X proceeding or permit an amendment of its petition so as to come under Chapter XI (Sections 141, 146, and 147). Further, a petition under Chapter X must state "the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under Chapter XI of this Act" (Section 130 (7)).

In this connection it may be noted that, whereas counsel for the Special Senate Investigating Committee referred to above, recommended that the primary line of demarcation between the two chapters be whether the corporation is insolvent in the bankruptcy or equity sense, this standard was clearly not adopted under the Act. As stated above, Congress also did not adopt the secondary criterion recommended by Committee counsel, that is, whether the corporation be publicly owned or not. The fact that this criterion was rejected by Congress is clear and conclusive on the question of Congressional intent.

As a matter of fact, although the Commission argues that Chapter X and Chapter XI are mutually exclusive in that a large publicly held corporation *must* act under Chapter X, it is clear from the structure of the Act that

¹² The Commission states (Petitioner's Brief, page 23) that the decision of the court below imputes to Congress the irrational intention of providing safeguards for mortgage bondholders but not for unsecured creditors. This argument has nothing whatever to do with size or public ownership, since the same argument would apply to a few creditors of a small corporation.

Chapter X must also be used where a corporation, no matter how small, proposes a readjustment which is more than a simple adjustment of its unsecured debt. No matter how small or closely held the corporation is, if it wishes to affect its secured indebtedness or its capital stock under the Bankruptcy Act, it must act under Chapter X.

Furthermore, the Commission's argument as to publicly held debtors is refuted by the provisions of Chapter X itself because if a debtor is below the criterions of size (not public ownership) therein set forth, it is not then subject to or entitled to many of the so-called "protection safeguards" of that Chapter.

Judge Chesnut, in the case of *In re Credit Service, Inc.*, (*supra* page 10) at p. 882 of 30 F. Supp. succinctly discusses the Commission's contention in this respect:

"The concrete contention of the Commission in this case is that Chapter XI is inapplicable where the debtor has outstanding publicly held securities. There is no language that I have been able to find in the chapter which either expressly or by clear implication contains this limitation. It can only be supplied by adding some such wording to the definition of the word 'debtor' or the definition of the word 'arrangement'. These definitions are, however, clearly and all-inclusively worded in the sections from which they are quoted, and they do not contain the important limitation which the Commission proposes to have read into them. In my opinion it is not legally permissible to supply by construction, where the language as used is clear, such an important qualification. There is here no room for construction at all. * * * Furthermore, the language sought to be supplied is itself vague and indefinite in its meaning, as it does not plainly define what shall constitute outstanding publicly held securities either in kind or in amount, or as to the number of holders. It seems to me quite impossible to supply such wording by construction based only on such legislative history as we have in this case."

That Congress specifically intended Chapter XI to be available to publicly held corporations is evidenced by Section 393, which provides for an exemption of securities issued under Chapter XI from the provisions of Section 5 of the Securities Act of 1933. (This section is substantially the same as Section 264 of Chapter X.)

*The argument of "mutual exclusiveness"*¹³

The Commission argues that Chapters X and XI are mutually exclusive and that a corporation with its securities outstanding in the hands of the public must act under Chapter X. We understand this to be an argument that Chapter X is the only method by which a publicly held corporation can effect any readjustment of debts. However, there are still several alternative methods by which such an adjustment can be made. For example, it is clear that such a corporation can proceed in ordinary bankruptcy, through an equity receivership, through a state receivership, or through special statutory provisions, such as the *in hac verba* provision in Sections 3 and 5 of the Delaware Corporation Law, or the New York State Burchill Act (New York Real Property Law Sections 121-123), where applicable. We are unable to understand how the claim can be made that a publicly held corporation does not have equal rights to proceed under Chapter XI where the language of Congress specifically permits all debtors, corporate and individual, to proceed thereunder. In conclusion, therefore, the history and the framework of the statutes point to one logical conclusion, namely, that Chapters X and XI, as well as ordinary bankruptcy, provide for different methods and types of relief, each one having a

¹³ We do not fully understand the meaning of this term but repeat it because it is used so frequently by the Commission in its brief.

separate history and being individually designed for a different purpose.

***The derivation of Chapter XI from
Sections 12 and 74***

Chapter XI is derived from former Sections 12 and 74 of the Bankruptcy Act. Section 12 authorized compositions by any person which could become a bankrupt. Section 74 applied to all such persons except corporations.

Section 12 did not authorize extensions as such. Section 74 did. However, it has been pointed out that under Section 12 compositions could be and were proposed which were in effect extensions of time.

Section 12 did not authorize the issuance of new securities, e.g. stock, in a composition. Accordingly, it was not adaptable to most types of readjustment required by large publicly held corporations. However, certain types of corporate readjustment could be effected as compositions by large companies. This would be particularly so in the case of a real estate corporation whose business was primarily the holding and operation of real estate investments, and securities of companies operating real estate investments (as in the case of the Debtor). Thus, in one case, a composition by a large corporation (total creditors' claims of more than \$12,000,000) was made in respect of bonded indebtedness which was held by over 3,000 bondholders. *In re Realty Associates Securities Corp.*, 69 F. (2d) 41 (C.C.A. 2d, 1934) cert. den. 292 U. S. 628 (1934).¹⁴ No question was raised as to the validity of the corporation acting under Section 12 although problems arising in this composition were twice before the Circuit Court of Appeals for the Second Circuit and twice before this Court. Furthermore, the composition proposed in that case was strikingly similar in substance to the

¹⁴ The same composition was also considered in 6 F. Supp. 549 which was modified in 74 F. (2d) 61 but confirmed in 295 U. S. 245 (1935).

arrangement proposed in this case. It is submitted that the arrangement proposed by the Debtor in this proceeding could always have been effected under Section 12. There is no evidence of any intention to restrict corporations which could formerly have acted under Section 12 from acting under Chapter XI.

The Commission states (Petitioner's Brief, page 17) that Chapter X is the successor of Section 77B and of equity receivership as the *normal* reorganization procedure for corporations with widely distributed securities; that Chapter XI is the successor to Sections 12 and 74 as the *normal* method of readjustment for small individual and corporate businesses; and infers that the criterion of normality is relevant in determining *restrictive use* of those chapters. It is illogical to argue that normality is a criterion of exclusiveness. For example, (1) Section 12 undoubtedly was normally used by small corporations, but it was occasionally used by large corporations (e.g., see *In re Realty Associates Securities Corporation*); (2) Chapter XI is the normal method for a small corporation to effect a readjustment of its debts; but if a small corporation requires the readjustment of its *secured* debts or stock, it must proceed under Chapter X.

II

THE FAIRNESS, EQUITABILITY AND FEASIBILITY OF THE ARRANGEMENT ORIGINALLY PROPOSED IS NOT PROPERLY IN ISSUE AT THIS TIME INASMUCH AS THE DISTRICT COURT HAS NOT YET CONFIRMED OR REFUSED TO CONFIRM ANY ARRANGEMENT.

The Commission (Petitioner's brief, page 33) and Judge Clark in his dissenting opinion (R. 426) argue that no arrangement can be inaugurated by this Debtor under Chapter XI which can properly satisfy the requirements of the

statute as to fairness and equitability. It seems rash to conclude that no fair, equitable and feasible arrangement in the instant case can be proposed. It is not the function of the courts to decide questions until they arise. No arrangement has as yet been confirmed and the question of whether or not any arrangement, which is fair and equitable and feasible, may or may not be promulgated is not in issue. The arrangement of which the Commission complains is no longer before the District Court, since an amended arrangement, which is not a part of the record, has been proposed. The Commission continually discusses involved statements of figures and facts which relate to the *substance* of the arrangement originally proposed. Such facts, since such arrangement is not before this Court, are entirely superfluous and irrelevant, and the Debtor sees no reason for a lengthy or detailed discussion of them.

As stated by Judge Swan in the majority opinion of the Circuit Court of Appeals in this proceeding (R. 423):

"Whether the proposed arrangement meets the requirements necessary for confirmation (section 366) is a matter unrelated to jurisdiction and one upon which the district court will later have to pass when the issue of confirmation is presented."

III

NOTWITHSTANDING STATEMENTS OF THE COMMISSION IT IS CLEAR THAT AN ARRANGEMENT CAN BE PROPOSED BY THIS DEBTOR WHICH MEETS THE REQUIREMENTS OF CHAPTER XI.

The Commission argues, relying upon the *Boyd*¹⁵ case and the *Los Angeles*¹⁶ case, that this Debtor can never propose an arrangement under Chapter XI which is "fair

¹⁵ *Northern Pacific Railway Co. v. Boyd*, 228 U. S. 482 (1913).

¹⁶ *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939).

and equitable" (Section 366) because the rights of the stockholders of the Debtor are not being changed.

It is submitted that those decisions are not applicable to Chapter XI proceedings.

Furthermore, we will show that this Debtor can propose an arrangement which is "fair and equitable" even within the meaning ascribed to that phrase in the *Boyd* and *Los Angeles* cases.

1. Inapplicability of the Boyd and Los Angeles cases to Chapter XI Proceedings.

Chapter XI (Section 306(1)) defines an arrangement as any plan of a debtor for the settlement, satisfaction or extension of the time of payment of his unsecured debts upon any terms. The statute further provides (Section 356) that an arrangement must include provisions modifying or altering the rights of unsecured creditors generally, or of some class of them, upon any terms or for any consideration. An arrangement may include (Section 357(1)) provisions for treatment of unsecured debts on a parity one with the other, or for the division of such debts into classes and the treatment thereof in different ways or upon different terms. Chapter XI does not contain any provision for changing the rights of secured obligations or stock. The very fact that Chapter XI expressly authorizes different treatment of unsecured creditors, which under the doctrine of the *Boyd* and *Los Angeles* cases should all receive equal treatment, and provides for altering and modifying the rights of unsecured creditors without changing the rights of stockholders, seems conclusively to exclude the application of the doctrine of those cases to Chapter XI proceedings. It is to be noted that in the *Los Angeles* case itself reference is made by this Court to the fact that compositions are different from reor-

ganizations (308 U. S. 119, footnote 14). An arrangement is both in fact and by its statutory history a composition.

As for the contention of the Commission that the words "fair and equitable" cannot mean one thing in Chapter X and another thing in Chapter XI, we respectfully point out that this Court has in two of the cases cited by the Commission itself for another point, expressly stated that words or phrases may have different meanings in different parts of the same statute. *American Security Co. v. District of Columbia*, 224 U. S. 491, 494 (1912); *Helvering v. Morgan's, Inc.*, 293 U. S. 121, 128 (1934). There seems no doubt whatever that the *Los Angeles* and *Boyd* cases do not apply to Chapters XII and XIII, which deal with real estate arrangements by individuals, and with arrangements by wage earners, and which also contain exactly the same phrase. The fact that Chapters X and XI deal with inherently different types of readjustment, viz. composition and extension in Chapter XI and complete reorganization in Chapter X, shows conclusively that the phrase also has a different meaning in Chapter XI from its meaning in Chapter X.

2. ***Contributions by Stockholders.***

A fair and equitable arrangement in conformity with the principles of the *Boyd* and *Los Angeles* cases can be proposed. (The amended arrangement, held by the referee to be both fair and equitable, is not a part of the record and therefore cannot properly be discussed.) The doctrines of the *Los Angeles* case and of the *Boyd* case are both the same, namely, that a senior class of securityholders cannot be made to sacrifice part of the value of their security in favor of junior securityholders having no equity, unless the junior securityholders make a contribution in order to maintain their position. The contribution, when the Debtor

is solvent,¹⁷ may be made by giving to the senior security-holders whose rights are being affected, property or additional securities senior to the junior securityholders the terms of whose obligations are not being changed.

The argument of the Commission that no arrangement can be proposed by the Debtor in this proceeding which is fair and equitable is believed to be specious. Chapter XI (Section 363) provides for the proposal of amendments to arrangements. If a proceeding should be dismissed in the event the original arrangement were held unfair or inequitable, the foregoing section of the statute would be indeed a vain thing. The Debtor does not believe it to be possible to determine, until the matter of the confirmation of an arrangement has been acted upon and an order entered thereon by the Court, whether the proceeding should or should not be dismissed for failure to propose a fair and equitable arrangement.

This Court in the *Los Angeles* case (where the debtor was insolvent) specifically recognized that stockholders could retain their interest if they made certain contributions to the reorganization.

The arrangement originally proposed provided for a substantial contribution from the equity interest of stockholders, *inter alia*, as follows:

¹⁷ The Commission in its brief infers and Judge Clark in his dissenting opinion (R. 427) states that the Debtor is insolvent, basing such argument on a theory that the assets of the Debtor "barely exceed \$7,000,000 while its liabilities total \$4,551,416 without including the 'contingent' liability of \$3,800,000 here to be modified." (R. 427) The record clearly demonstrates that the figure of \$7,000,000 does not include the asset represented by the stock and a large unsecured obligation of Trinity Buildings Corporation of New York. (R. 226-325) In the arrangement originally proposed (R. 32) the Debtor states that the fair market value of the mortgaged premises is believed to be well in excess of the mortgage. It is therefore clear from the record itself that the Debtor is not insolvent in the bankruptcy sense. We point out that throughout this Court's opinion in the *Los Angeles* case emphasis is laid on the fact that the debtor in such case was completely insolvent in the bankruptcy sense.

(a) The Debtor's certificate holders would receive a new guarantee, enforceable irrespective of the provisions of the New York State Mortgage, Moratorium and Deficiency Judgment Laws, whereas, the present guarantee, which is the subject of modification in this proceeding, would not be enforceable as to principal inasmuch as the value of the mortgaged premises is believed to be in excess of the amount due under the Mortgage (R. 32). (New York Civil Practice Act, Sections 1077-a et seq., 1083-b; *Honeyman v. Hanan*, 275 N. Y. 382, appeal dismissed 302 U. S. 375.)

In addition, the arrangement could be amended so as to provide for additional contributions by the stockholders of the Debtor, as follows:

(b) Certificate holders might receive, in addition to full par for par value in new bonds, a bonus of preferred stock of Trinity (the Debtor's subsidiary) so that the certificate holders would receive the full principal amount of their share certificates, plus a bonus, before the Debtor, or indirectly its stockholders, received anything.

(c) A sum in cash, even though the certificate holders would have no recourse whatever against the Debtor on the guarantee, as to principal, because of the New York moratorium laws referred to above.

IV

THE SECURITIES AND EXCHANGE COMMISSION HAS NO POWER OR AUTHORITY TO INTERVENE IN A PROCEEDING UNDER CHAPTER XI EVEN WITH THE PERMISSION OF THE COURT. THE COMMISSION IS A STATUTORY BODY WITH LIMITED AUTHORITY AND NO STATUTE AUTHORIZES ITS PARTICIPATION IN A CHAPTER XI PROCEEDING. THE COMMISSION'S PARTICIPATION HEREIN IS ULTRA VIRES.

The Commission, a statutory body, has no power to participate in this proceeding. It is an established principle that governmental agencies created by statute have no authority except such as is specifically granted them by statute.

A leading case on the subject is *Federal Trade Commission v. Ralgdam Co.*, 283 U. S. 643 (1931) in which Mr. Justice Sutherland, speaking for this Court, succinctly stated the established principles as follows (p. 649):

“* * * Official powers cannot be extended beyond the terms and the necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.”

That case involved a cease and desist order by the Federal Trade Commission and this Court held that the Commission was without jurisdiction to make such order in the absence of the facts required by the statute to give it such jurisdiction.

In *Davis v. Rochester Can Company*, 220 A. D. 487 (1927) (affirmed without discussion as *Mellon v. Rochester Can Company*, 247 N. Y. 521, 1928), it was held that the Interstate Commerce Commission had no jurisdiction to determine disputed claims for money due from a shipper

to a transportation company. The court said at pages 489-490 with respect to the powers of such Commission:

"Extensive as are its powers the same are, nevertheless, limited by the statutes that give it life and being. Within its assigned circle of duty it is practically supreme—beyond that it has no authority or obligation whatsoever, except such as may be necessarily incident to its specific powers. ***

"It is purely the creation of the Congress of the United States, which may add to or take away from its powers and likewise may abolish it altogether. Upon Congress alone its jurisdiction depends. It cannot be enlarged or diminished except by the will of Congress lawfully expressed. No individual nor corporation can confer upon it official power or take from it that which it has. An examination of the act of 1887 and its various amendments discloses that no authority or jurisdiction to determine disputed claims for money due from a shipper to a transportation company is vested in the Commission either as a court or as an arbitrator. Neither is such a power necessary for the proper conduct of the business therein delegated to it. Those matters are left for the determination of the courts and as to them the Commission does not exist. Both by common law and statute, a natural person may at the request of disputants arbitrate their differences. Such a power cannot, even by consent, be conferred on a corporation, for it has no entity outside its appointed corporate powers and those necessarily incidental thereto. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 636; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43; *People v. Utica Ins. Co.*, 15 Johns. 358, 383; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308.)

"Considering the Commission independently of its corporate attributes and purely as a governmental agency the same rule applies. It needs no citation of authority to uphold the proposition that the power and authority of a public servant are

governed entirely by the statutory limitation of his employment."

Followed in *Pennsylvania R. R. Co. v. Fox & London Inc.*, 93 F. (2d) 669 (C.C.A. 2d 1938).
 See also: *Throop on Public Officers*, (1892) Section 556.

Nowhere in the statutes creating the Securities and Exchange Commission or granting it additional powers is there to be found any authority, express or implied, for its participation under Chapter XI. Chapter XI makes no reference to the Commission although Chapter X specifically grants a limited authority for participation by the Commission in Chapter X proceedings. The Commission's participation in this proceeding is clearly ultra vires.

The Effect of Rule 24 of the Federal Rules of Civil Procedure

As stated above, unlike Chapter X, Chapter XI gives no express authority to the Commission to act as intervenor. As to intervention under Chapter XI, it was the apparent intent of Congress that all questions of intervention should be determined by the Bankruptcy Act and General Bankruptcy Practice (Section 302). Chapter XI contains no provision at all for intervention.¹⁸

General Order in Bankruptcy 48 provides that the General Orders (except General Orders 18, 28 and 29) shall apply to proceedings under Chapter XI. General Order 37 provides that in proceedings under the Bankruptcy Act, the Rules of Civil Procedure shall, unless in-

¹⁸ There are, of course, provisions in Chapter XI granting all interested parties the right to be heard—Sections 334, 365 and others. It is also to be noted that Section 392 provides that, unless otherwise ordered by the Court, notices are to be given in the manner prescribed by Section 58 of the Bankruptcy Act, and that Section 58 provides only for notice to creditors.

consistent with the Act, be followed as nearly as may be.¹⁹ Therefore, Rule 24 of the Rules of Civil Procedure is applicable to Chapter XI proceedings. Rule 24 provides as follows:

“(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

Rules 24(a)(1) and 24(b)(1) are clearly inapplicable, inasmuch as no statute confers on the Commission either an unconditional or a conditional right to intervene in Chapter XI proceedings.

Rule 24(a)(3) is likewise clearly inapplicable since the Commission is not adversely affected by the disposition or distribution of any property in the custody of the Court.

Therefore, the justification for permitting the Commission to intervene must have its foundation either on

¹⁹ Rule 81 of the Rules of Civil Procedure provides that the rules shall not apply to bankruptcy proceedings except in so far as they may be made applicable by rules promulgated by the United States Supreme Court.

- (1) Rule 24(a)(2), on the theory that the Commission has an interest in the proceeding, and that such interest, if any, is not represented adequately by existing parties, and in addition that the Commission is bound by a judgment in the proceeding; or
- (2) Rule 24(b)(2), on the theory that the Commission has a claim which has a question of law or fact in common with the main proceeding.

It is submitted that as far as intervention of right is concerned under Rule 24(a)(2), the Commission does not have an interest in the proceeding within the meaning of that subdivision of the rule. According to the notes prepared under the direction of the Advisory Committee, Rule 24 is a mere application and restatement of the former practice of the Federal Courts with respect to intervention, both at law and in equity, under which practice only "interested parties" were allowed to intervene. (Moore's Federal Practice, 1938, p. 2325.) The extent of interest required before a court can permit a party to intervene is well expressed in *Smith v. Gale*, 144 U. S. 509, 518-519 (1892), where this Court was discussing the construction of various statutes:

"These provisions of the Dakota code appear to have been originally adopted from Louisiana, wherein it is held *** that the interest which entitles a party to intervene must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. *Gasquet v. Johnson*, 1 La. 425, 431. In *Horn v. Volcano Water Co.*, 13 California, 62, 69, the Supreme Court of California had occasion to construe a similar provision of the code of that State, and held, speaking through Mr. Justice Field, now a member of this court, that 'the interest mentioned in the statute which entitles

a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment * * *. To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, which is the subject of litigation.***

"The intervention must be not only to protect the direct and immediate interest of the intervenor in a suit, but she is bound to make that interest appear by proper allegations in her petition."

See also:

Lombard Investment Company et al. v. Seaboard Manufacturing Company, 74 Fed. 325 (C. Ct. S.D. Ala. 1896);

Glass v. Woodman et al., 223 Fed. 621 (C.C.A. 8th, 1915);

Stewart v. Kansas City, 239 U. S. 14 (1915);

Howe v. Meriwether, 172 Fed. 868 (C.C.A. 8th, 1909);

Rhinehart v. Victor Talking Machine Co., 261 Fed. 646 (D. Ct. N.J. 1917);

Clark v. Young, 31 F. (2d) 227 (C.C.A. 5th, 1929).

No possible construction of Rule 24 (b) (2) can permit my intervention, since it is self-evident that the Commission's "claim or defense and the main action" do not have any "question of law or fact in common."

The Commission in its brief (Petitioner's Brief, page 9) urges that the court below addressed its discussion on the intervention point solely to whether the Commission could intervene as of right and did not discuss the question of whether the Commission could intervene with

permission of the court. However, the point of permissive intervention was fully argued by the Commission in its brief before the Circuit Court of Appeals and presumably was fully considered by that court and determined adversely to the contention of the Commission.

V

THE COMMISSION HAD NO STATUS TO APPEAL FROM THE ORDERS OF THE DISTRICT COURT. THE RIGHT OF APPEAL IS A CREATURE OF STATUTE AND CANNOT BE PROSECUTED WITHOUT STATUTORY AUTHORITY. NEITHER THE BANKRUPTCY ACT NOR ANY OTHER STATUTE GRANTS THE COMMISSION THE RIGHT TO APPEAL IN A CHAPTER XI PROCEEDING.

This question seems now academic, but we submit that it was correctly decided below (R. 424-425).

The right of appeal is purely statutory and is available only to those to whom the privilege is extended. *Credit Alliance Corporation v. Atlantic Pacific & Gulf Ref. Co.*, 77 F. (2d) 595, 596 (C.C.A. 8th, 1935); *In re Maryanov*, 20 F. (2d) 939, 941 (D. Ct. E.D.N.Y. 1927).

The bankruptcy court is a statutory court and possesses only the jurisdiction conferred upon it by statute. *Chicago Bank of Commerce v. Carter*, 61 F. (2d) 986 (C.C.A. 8th, 1932). Under Section 25 of the Bankruptcy Act appeals under the bankruptcy act may be taken only by an "aggrieved party". The Commission is neither aggrieved by the orders of which it complains, nor is it a proper party to the proceeding as shown above in the discussion as to its right to intervene. It therefore has no standing which entitles it to appeal. *Chicago v. Chicago Rapid Transit Co.*, 284 U. S. 577 (1931).

Even in Chapter X where the Commission has certain

specific duties, it is specifically denied the right of appeal (Section 208); in Chapter XI the Commission is not even mentioned. Furthermore, since the Commission may not, under Section 208, appeal from an order dismissing a Chapter X petition on the ground that the remedy under Chapter XI is adequate, why should it be permitted to appeal from an original order approving the filing and adequacy of a Chapter XI petition?

CONCLUSION

The judgment appealed from is right, and should be affirmed.

Dated: April 20, 1940.

Respectfully submitted,

JOSEPH M. HARTFIELD,
Counsel for Respondent.

JOSEPH A. BENNETT,

CHARLES W. DIBBELL,

HENRY M. MARX,

of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 796.—OCTOBER TERM, 1939.

Securities and Exchange Commission,
Petitioner,
vs.
United States Realty and Improvement
Company. On Writ of Certiorari to
the United States Circuit Court of Appeals
for the Second Circuit.

[May 27, 1940.]

Mr. Justice STONE delivered the opinion of the Court.

The questions are whether respondent's petition for an arrangement of its unsecured debts under Chapter XI of the Bankruptcy Act should be dismissed because the relief obtainable under that chapter is inadequate, and whether the Securities and Exchange Commission is entitled to raise and litigate that question by intervention and appeal.

Respondent, a New Jersey corporation doing business in New York as owner of and manager of real estate investments, has outstanding 900,000 shares of capital stock without par value, which are listed on the New York Stock Exchange and are stated by respondent to be held by some seven thousand stockholders. It has liabilities of \$5,051,416, of which only \$74,916 is current. This indebtedness includes two series of publicly held debentures aggregating \$2,339,000, maturing January 1, 1944, which are secured by a pledge of corporate stock of little value and a \$3,000,000 note, due August 12, 1939, which is secured by a first mortgage owned by respondent. In addition respondent is also liable as a guarantor of payment, principal and interest, and sinking fund of mortgage certificates in the sum of \$3,710,500, issued by its wholly owned subsidiary Trinity Building Corporation of New York and now in the hands of some nine hundred holders. These certificates have been in default for failure to pay interest, principal and sinking fund since January 1, 1939. They are secured by mortgage of real estate and buildings which are Trinity's only substantial assets. Each year since 1936 respondent has suffered a net loss in the con-

duet of its business and is now unable to pay its debts as they mature.¹

Before maturity of the first mortgage certificates, respondent and the Trinity Company joined in proposing to certificate holders a plan for the modification of the obligation of the certificates, leaving unaffected the other indebtedness and stock of respondent. By this plan the maturity of the certificates was to be extended, the rate of interest reduced, and the terms of the provisions for payment of the sinking fund modified. Respondent's guarantee, as to the extension and interest was to be modified accordingly, and its guarantee of sinking fund payments was to be eliminated. The plan was to be consummated by resort to two proceedings, one to be instituted by respondent under Chapter XI of the Bankruptcy Act, 11 U. S. C. Supp. V, § 701 *et seq.*, 52 Stat. 840, 905, for an "arrangement" modifying its guarantee of the certificates in the manner already indicated. The other was to be instituted on behalf of Trinity in the New York state courts under the Burchill Act, New York Real Property Law, §§ 121-123, to secure the appropriate modification of Trinity's primary obligation on the certificates. The plan provided that the modification of respondent's guarantee by the Chapter XI proceeding should stand, even though the state court should refuse to confirm the proposed modification of Trinity's obligation on the certificates. When the assent to the plan of holders of certificates amounting to approximately 55 per cent. in number and amount had been obtained, the present proceeding was begun May 31, 1939, by the filing in the district court for Southern New York of a petition praying that the proposed "arrangement" affecting the unsecured indebtedness of respondent be approved.

The district court found that the petition was properly filed² under § 322 of Chapter XI of the Bankruptcy Act; and directed that re-

¹ The alleged value of debtor's assets is \$7,076,515. Of this \$5,200,000 is represented by the stock of the subsidiary and a first mortgage on a building owned by the subsidiary which is pledged to secure respondent's \$3,000,000 note. Current assets are less than \$400,000. The balance of the assets, consisting chiefly of mortgages, loans and other securities in the amount of \$555,655, an investment of \$477,300 in securities of an independent company, unimproved real estate valued at \$290,000, and a note receivable from a subsidiary of \$137,500. As against the total nominal value of these assets of \$7,076,515, the debtor's total liabilities, including its liability on the matured debenture certificates, are \$9,261,916.

² The record shows that counsel for one of the committees of bondholders interposed objections to the Chapter XI proceedings and proposed to file an involuntary petition under Chapter X. The district judge expressed the

spondent debtor continue in possession of the property. On July 18, 1939, the district court entered an order permitting the Securities and Exchange Commission to intervene. The motions of the Commission to vacate the order approving the debtor's petition, to dismiss the proceeding under Chapter XI, and to deny confirmation of the proposed arrangement, were denied by the district court and the cause was referred to a referee for further proceedings. On appeal by the Commission from these several orders and on appeal of the respondent from the order of the district court permitting the Commission to intervene, the appeals being consolidated and heard together, the Court of Appeals for the Second Circuit reversed the order permitting the Commission to intervene and dismissed the appeal of the Commission. 108 F. (2d) 794. We granted certiorari April 1, 1940, the questions raised being of public importance in the administration of the Bankruptcy Act.

The Court of Appeals held that the proceeding to secure approval of the arrangement, embodied in the plan proposed by respondent, was properly brought under Chapter XI of the Bankruptcy Act; that the intervention by the Commission was not authorized by any provision of the Bankruptcy Act and that it had no interest affected by the proceeding under that chapter entitling it to intervene under the applicable rules controlling intervention in the federal courts, and that consequently it was not aggrieved by the order appealed from and so was not entitled to maintain its appeal.

The Commission argues that Chapter X of the Bankruptcy Act prescribes the exclusive procedure for reorganization of a large corporation having its securities outstanding in the hands of the public such as respondent,³ and that consequently the district court was without jurisdiction to entertain respondent's petition under Chap-

opinion that a Chapter X proceeding was preferable, but when the debtor agreed to make an immediate interest payment of one and one-half per cent. for the purpose of dissuading the creditors from filing the Chapter X petition, and when the objecting creditors accepted the offer and dropped the involuntary petition, the judge felt compelled to continue the Chapter XI proceeding.

³ By § 126 a corporation or three or more creditors may file a petition under Chapter X.

By § 130 every petition shall state:

"(1) that the corporation is insolvent or unable to pay its debts as they mature;

"(2) the applicable jurisdictional facts requisite under this chapter;

"(7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter XI of this Act;"

ter XI; that in any case the district court should have dismissed the petition because in the circumstances no fair and equitable arrangement affecting respondent's unsecured creditors alone such as is prescribed by Chapter XI, can be consummated in a proceeding under that chapter. Such being the status of the cause under Chapter XI, the Commission insists that it was properly allowed to intervene in order to protect the interest of the public specially committed to its guardianship by the provisions of Chapter X, and to forestall the impairment of its own functions under that chapter by an unauthorized or improper resort by respondent to Chapter XI, and that for the same reason the Commission was entitled to appeal from the order of the district court refusing to dismiss the Chapter XI proceedings.

To this it is answered, as the Court of Appeals held, that respondent, although a large corporation with its securities widely distributed in the hands of the public, is nevertheless within the literal terms of Chapter XI; which unqualifiedly authorizes a debtor to petition under that chapter for an arrangement with respect of its unsecured indebtedness, and that the district court was accordingly bound to entertain the petition, however desirable it might be that the reorganization should proceed under Chapter X, whose procedure is better adapted in cases like the present to protect the public interest and to secure a fair and equitable reorganization, than are the provisions of Chapter XI.

Chapter XI provides a summary procedure by which a debtor may secure judicial confirmation of an "arrangement" of his unsecured debts. The debtor who is defined as a "person who could become a bankrupt under section 4 of the Act", § 306(3), may according to sections 4 and 1(23), be any person (which includes corporations), except a municipal, railroad, insurance or banking corporation or a building and loan association. The debtor files his original voluntary petition for an arrangement in such a court as would have jurisdiction of a petition in ordinary bankruptcy⁴ and must file with the petition the proposed arrangement. §§ 322, 323. An arrangement is defined as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts upon any terms." § 306(1). The unsecured debtors may be treated generally or in classes. §§ 356, 357.

⁴ § 811 confers on the court in which the petition is filed exclusive jurisdiction of the debtor and his property, where not inconsistent with the provisions of the chapter.

It is evident that the language of the sections to which we have referred in terms confers on the court jurisdiction of a petition for an arrangement, which the present petition is, filed by a debtor, which the respondent is, in the technical sense that it confers on the court power to make orders in the cause which are not open to collateral attack. See *Pennsylvania v. Williams*, 294 U.S. 176, 180, *et seq.* But the Commission points out that a proceeding begun under Chapter X may be begun and continued under that chapter only if the petition is filed in good faith, §§ 130(7), 143, ¶ 46(2), 221, and that under § 146(2) "a petition shall be deemed not to be filed in good faith if . . . (2) adequate relief would be obtainable by a debtor's petition under the provisions of Chapter XI"; that Chapter X, devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public through the intervention of the Commission, while Chapter XI which is peculiarly adapted to the speedy composition of debts of small individual and corporate businesses, omits the machinery for reorganization set up by Chapter X; and contains no provision for participation by the Commission in a proceeding under Chapter XI. From this it argues that the district court was without jurisdiction to entertain respondent's petition under Chapter XI, and the readjustment of its indebtedness through judicial action can properly proceed only with the safeguards, public and private, afforded by Chapter X.

While we do not doubt that in general, as will presently appear more in detail, the two chapters were specifically devised to afford different procedures, the one adapted to the reorganization of corporations with complicated debt structures and many stockholders, the other to composition of debts of small individual business and corporations with few stockholders, we find in neither chapter any definition or classification which would enable us to say that a corporation is small or large, its security holders few or many, or that its securities are "held by the public", so as to place the corporation exclusively within the jurisdiction of the court under one chapter rather than the other. But granting the jurisdiction of the court, the question remains of the propriety, in the circumstances, of its order retaining jurisdiction, and of the extent of its duty to go for-

6. *Sec. and Ex. Com. vs. U. S.; Realty and Imp'v'l. Co.*

ward with the proceeding under Chapter XI in the face of the contention that Chapter X alone affords a remedy adequately protecting the public and private interests involved. The answer turns not on the court's statutory jurisdiction to entertain a proceeding under Chapter XI, but on considerations growing out of the public policy of the Act found both in its legislative history and in an analysis of its terms, and of the authority of the court clothed with equity powers and sitting in bankruptcy to give effect to that policy through its power to withhold relief under Chapter XI when relief is available under Chapter X which is adequate and more consonant with that policy.

Before the enactment of Section 77B of the Bankruptcy Act, ⁵ Stat. 911, 912, the bankruptcy mechanism was designed for the final liquidation of the bankrupt's estate, except to the extent only that a compromise with creditors was authorized by §§ 12, 74. Bankruptcy afforded no facilities for corporation reorganization which in consequence, could be effected only through resort to the equity receivership with its customary mortgage foreclosures and its attendant paraphernalia of creditors' and security holders' committees, and of rival reorganization plans. Lack of knowledge and control by the court of the conditions attending formulation of reorganization plans, the inadequate protection of widely scattered security holders, the frequent adoption of plans which favored management at the expense of other interests, and which afforded the corporation only temporary respite from financial collapse, so often characteristic of reorganizations in equity receiverships, led to the enactment of 77B.⁶

The creation of the Securities and Exchange Commission, specially charged by various statutes with the protection of the interests of the investing public,⁷ and observed inadequacies of 77B,⁸

⁵ See S. Doc. No. 65, 72d Cong., 1st Sess., p. 90; H. Rep. No. 1049, 72d Cong., 1st Sess., p. 2.

⁶ The basic assumption of Chapter X and other acts administered by the Commission is that the investing public dissociated from control or active participation in the management, needs impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems. See, e. g., Securities Act of 1933, 48 Stat. 74; 15 U. S. C. §§ 77a-77aa; Securities and Exchange Act of 1934, 48 Stat. 881; 15 U. S. C. § 78; Public Utility Holding Company Act of 1935, 49 Stat. 838; 15 U. S. C. Supp. V, § 79; Trust Indenture Act of 1939, 53 Stat. 1149; 15 U. S. C. Supp. V, §§ 77aaa-77bbb.

⁷ The revision of 77B resulted from the investigation of a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc.

to its revision and enactment in changed form as Chapter X, so as to provide for a larger measure of control by the court over security holders' committees and the formulation of reorganization plans and to secure impartial and expert administrative assistance in corporate reorganizations through participation of the Commission. Except where the liabilities are less than \$250,000, Chapter X requires the appointment of a disinterested trustee, §§ 156-158, and a thorough examination and study by the trustee of the debtor's financial problems and management, § 167(3)(5). The trustee is required to report the result of his study, to send the report to all security holders with notice to submit to him proposals for a plan of reorganization, § 167(5)(6). He then formulates a plan or reports the reasons why a plan cannot be formulated, § 169. By § 176 consent to a plan in advance of its initial approval by the judge is void unless procured with his consent. A large measure of control is given to the court over the reorganization and of committees of security holders and their compensation, §§ 163, 165, 209, 212, 241-243.

If the judge finds the plan presented worthy of consideration he may refer it to the Commission for report and must do so where the liabilities of the debtor, as in the present case, exceed \$3,000,000, § 172. When the plan is submitted to creditors after approval by the judge it is accompanied by the report of the Commission and the opinion of the judge approving the plan, § 175. The Commission with the approval of the court is authorized to participate generally in the proceedings as a party and it is its duty to do so upon request of the court, § 208.

No. 268, 74th Cong., 2d Sess.; and from a study by the Securities and Exchange Commission of the degree of protection afforded to the investing public in reorganizations. Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1936-1939). See Hearings before the Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess.; Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess.; H. Rept. No. 1409, 75th Cong., 1st Sess.; S. Rept. No. 1916, 75th Cong., 3d Sess. See Dodd, The Securities and Exchange Commission's Reform Program for Bankruptcy Reorganizations, 38 Col. L. Rev. 223; Swaine, "Democratization" of Corporate Reorganizations, 38 Col. L. Rev. 256; Houston, Corporate Reorganizations under the Chandler Act, 38 Col. L. Rev. 1199; Tetor, Reorganization Revised, 48 Yale L. J. 573; Gerdes, Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act, 52 Harv. L. Rev. 1; Rostow and Cutler, Competing Systems of Reorganization, Chapters X and XI of the Bankruptcy Act, 48 Yale L. J. 1334.

No comparable safeguards are found in Chapter XI.⁸ Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is under the control of the debtor. The process of formulating an arrangement and the solicitation of consent of creditors, sacrifices to speed and economy every safeguard, in the interest of thoroughness and disinterestedness, provided in Chapter X. The debtor is generally permitted to stay in possession and operate the business under the supervision of the Court, § 342, and a trustee is provided for only in the case where a trustee in bankruptcy has previously been appointed and is in possession, or if "necessary" a receiver may be appointed. § 332. The debtor proposes the arrangement, §§ 306(1), 323, 357, and the only opportunity afforded the creditors in respect to the proposed plan is to accept or reject it as submitted by the debtor. Acceptances may be solicited either before or after filing the petition and always before approval of the plan by the Court, § 336(4). Section 361 authorizes confirmation of an arrangement when accepted by all the creditors affected by it, "if the court is satisfied that the arrangement and the acceptances are in good faith," and Section 362 permits confirmation if only a majority of the creditors affected accept. The arrangement is to be confirmed if the Court is satisfied that "(1) the provisions of this Chapter have been complied with; (2) it is for the best interest of the creditors; (3) it is fair, equitable and feasible ; and (5) the proposal and its acceptances are in good faith ". § 366.

There are no provisions for an independent study of the debtor's affairs by court or trustee, or for advice by them to creditors with respect to their rights or interests in advance of their consent to the arrangement. Committees of the creditors are permitted, §§ 324, 338, but there is no restriction on or supervision over their selection and conduct as in Chapter X. The arrangement may be consummated at the conclusion of a single creditors' meeting. The Court in passing upon the arrangement, is without the benefit of investigation and study by the trustee or Commission, which Congress has

⁸ Chapter XI was sponsored by the National Association of Credit Men and other groups of creditors' representatives expert in bankruptcy. Hearings before the House Committee on the Judiciary on H. R. 6439 (reintroduced and passed in 1938 as H. R. 8046), 75th Cong., 1st Sess., pp. 31, 35. Their business of representing trade creditors in small and middle-sized commercial failures is an important factor in the background of the chapter. See, Montgomery, Counsel for the Association of Credit Men, on Arrangements, 13 J. N. A. Ref. Bankruptcy, 17.

required in reorganization proceedings under Chapter X, and is then faced with the fact that a majority of the creditors have already accepted the plan.

Still more important are the differences in the remedies obtainable under the two chapters which result from differences in the nature of the two proceedings and in the securities which may be affected by them. A plan under Chapter X may affect one or more classes of debts or securities of the corporation to be reorganized, and a subsidiary of the debtor may be brought into such a proceeding and reorganized with the debtor. § 129. Under Chapter XI only the rights of unsecured creditors of the debtor may be arranged and this without alteration of the status of any other classes of security holders or of subsidiaries. Both chapters provide for confirmation of the plan or arrangement by the judge "if satisfied that" it "is fair and equitable and feasible" and if "the proposal" of the plan or arrangement "and its acceptance are in good faith", §§ 221, 366. "Fair and equitable", taken from § 77B and made the condition of confirmation under both Chapter X or Chapter XI are "words of art" having a well understood meaning in reorganizations in equitable receiverships and under § 77B which is incorporated in the structure of both Chapters X and XI. See *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 115, *et seq.* The phrase signifies that the plan or arrangement must conform to the rule of *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, which established the principle which we recently applied in the *Los Angeles* case, that in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts and that any scaling down of the claims of creditors without some fair compensating advantage to them which is prior to the rights of stockholders is inadmissible.

Since the sections under Chapter XI already considered admit of an "arrangement" only with respect to unsecured creditors without alteration of the relations of any other class of security holders, and since it contemplates, as required by § 366, that the arrangement shall be fair and equitable within the meaning of the *Boyd* case, it is evident that Chapter XI gives no appropriate scope for an arrangement of an unsecured indebtedness held by some nine hundred individual creditors of a corporation having seven thousand

stockholders. The hope of securing an arrangement which is fair and equitable and in the best interests of unsecured creditors, without some readjustment of the rights of stockholders such as may be had under Chapter X, but is precluded by Chapter XI, is at best but negligible and, if accomplished at all, must be without the aids to the protection of creditors and the public interest which are provided by Chapter X, and which would seem to be indispensable to a just determination whether the plan is fair and equitable.

Respondent suggests that the proposed arrangement may be taken to satisfy the test of the *Boyd* case since under it the certificate holders would receive a new guarantee, enforceable as to principal notwithstanding the New York moratorium law, in place of the old guarantee to which that law applies. See *Honeyman v. Hanen*, 275 N. Y. 382, appeal dismissed 302 U. S. 375. It also insists that it is not impossible that an arrangement of its unsecured indebtedness under Chapter XI may be proposed which would meet the test. It states that, availing itself of the privilege afforded by § 363, it has proposed an amended arrangement which is not in the record and the terms of which are not disclosed. But it suggests that the arrangement could be amended so as to provide for a ratable distribution to certificate holders of preferred stock of Trinity, respondents subsidiary, held by respondent or for a similar distribution of cash. But such suggestions raise the question whether the supposed advantage to the creditors is a fair and adequate substitute for the elimination of stockholders within the requirements of the *Boyd* case—a question which obviously cannot be answered with any assurance in the present case without resort to the facilities for investigation of the financial condition and structure of the debtor and its subsidiary, and to the expert aid and advice of the Commission available under Chapter X.

Confirmation of an arrangement follows a finding of the court that it is for the best interests of the creditors, § 366(2). Here determination of what is in the "best interest of the creditors" depends on the answer to the question whether the stockholders should be eliminated or, the creditors should receive some substitute compensation, and whether that compensation is fair and equitable. In a situation like the present it is in the best interests of the creditors that these questions should be answered in a Chapter X proceeding.

While this means that arrangements of unsecured debts of cor-

porations, like respondent, may not, be "in the best interests of creditors" and "feasible" under Chapter XI, it does not mean that there is no scope for application of that chapter in many cases where the debtor's financial business and corporate structure differ from respondent's. This is especially the case with small individual or corporate business where there are no public or private interests involved requiring protection by the procedure and remedies afforded by Chapter X. In cases where subordinate creditors or the stockholders are the managers of its business, the preservation of going-concern value through their continued management of the business may compensate for reduction of the claims of the prior creditors without alteration of the management's interests, which would otherwise be required by the *Boyd* case. See *Case v. Los Angeles Lumber Products Co.*, *supra*, 121, 122.

Under § 146(2) a petition may not be filed under Chapter X unless the judge is satisfied that "adequate relief" would not be obtainable under Chapter XI. Obviously the adequacy of the relief under Chapter XI must be appraised in comparison with that to be had under Chapter X, and in the light of its effect on all the public and private interests concerned including those of the debtor. Applying this test, if respondent had proceeded under Chapter X, the judge would have been compelled upon inquiry to approve its petition on the ground that it complied with the requirements of Chapter X, and that adequate relief could not be obtained under Chapter XI. That being the case the question here is whether, in the absence of any provision of Chapter XI specifically authorizing the dismissal of the petition, the district court should on that ground have dismissed the proceeding under Chapter XI, leaving respondent free to proceed under Chapter X which affords every remedy which could be obtained under Chapter XI and more.

A bankruptcy court is a court of equity, § 2, 11 U. S. C. § 11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. *Bardes v. Hawarden Bank*, 178 U. S. 524, 534, 535; *Continental Illinois Nat. Bank & T. Co. v. C. R. I. & Pacific Ry.*, 294 U. S. 648, 675; *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131; *Pepper v. Litton*, 308 U. S. 295. A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public in-

terest. It may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer. *Pennsylvania v. Williams, supra*, 185 and cases cited; *Virginia Railway v. Federation*, 300 U. S. 515, 549, *et seq.* Before the provisions for alternative remedies were brought into the Bankruptcy Act by Chapters X and XI the occasion was rare when a court could have felt free to deny a petition in order to serve some public or collateral interest at the expense of the petitioner's right to an adjudication. But here respondent, if dismissed, need not go without remedy. All that it can secure rightly or equitably in a Chapter XI proceeding is to be had in a Chapter X proceeding. The case stated most favorably to respondent is that it has proposed an arrangement which appears on its face not to be "fair and equitable" and hence not to be entitled to confirmation under Chapter XI. Respondent's circumstances, as disclosed by its petition and proposed arrangement, are such as to raise a serious question whether any fair and equitable arrangement in the best interest of creditors can be effected without some re-arrangement of its capital structure. In any case that and subsidiary questions cannot be answered in the best interest of creditors without recourse to the procedure of a Chapter X proceeding. Pending the litigation respondent seeks to stay the hand of its creditors and in the meantime to avoid that inquiry into its financial condition and practices and its business prospects, provided for by Chapter X without which there is at least danger that any adjustment of its indebtedness will not be just and equitable, and that its revived financial life will be too short to serve any public or private interest other than that of respondent.

In this situation, we think the court was as free to determine whether the relief afforded by Chapter XI was adequate as it would have been if respondent had filed its petition under Chapter X. What the court can decide under § 146 of Chapter X as to the adequacy of the relief afforded by Chapter XI, it can decide in the exercise of its equity powers under Chapter XI for the purpose of safeguarding the public and private interests involved and protecting its own jurisdiction from misuse. Here, we think it was plainly the duty of the district court in the exercise of a sound discretion to have dismissed the petition remitting respondent if it was

so advised to the initiation of a proceeding under Chapter X, in which it may secure a reorganization which, after study and investigation appropriate to its corporate business structure and ownership, is found to be fair, equitable and feasible, and in the best interest of creditors. While a bankruptcy court cannot, because of its own notions of equitable principles, refuse to award the relief which Congress has accorded the bankrupt, the real question is, what is the relief which Congress has accorded the bankrupt and is it more likely to be secured in a Chapter X or Chapter XI proceeding? In answering it we cannot assume that Congress has disregarded well settled principles of equity, the more so when Congress itself has provided that the relief to be given shall be "fair and equitable and feasible". Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part.

If respondent had sought relief by way of an equity receivership such would have been the duty of the Court. *Pennsylvania v. Williams, supra.* We think it is no less so here. Before the enactment of Chapters X and XI, the district court in a 77B proceeding was "not bound to clog its docket with visionary or impracticable schemes of resuscitation", however honest the efforts of the debtor and however sincere its motives, and it was its duty to dismiss the proceeding whenever it appeared that a fair and equitable plan was not feasible, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22. And it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition to move for the vacation of an adjudication or the dismissal of a petition on grounds, whether strictly jurisdictional or not,⁹ that the proceeding ought not to be allowed to proceed.

The Court of Appeals thought that the Commission had no such special interest as to entitle it to intervene as of right in the Chapter XI proceeding and concluded that the district court erred in

⁹ *Royal Indemnity Co. v. American Bond & Mortgage Co.*, 61 F. (2d) 875, aff'd 289 U. S. 165; *In re Ettinger*, 76 F. (2d) 741; *Chicago Bank of Commerce v. Carter*, 61 F. (2d) 986; *Vassar Foundry Co. v. Whiting Corp.*, 2 F. (2d) 240; *In re Nash*, 249 Fed. 375.

permitting the intervention and that from this it followed that the Commission had no right to appeal. Its decision is in effect that a governmental agency not asserting the right to possession or control of specific property involved in a litigation may not be permitted to intervene without statutory authority. Neither Chapter X nor Chapter XI, in terms, gives a right of "intervention", but the Commission is authorized, with the permission of the court, to appear in any Chapter X proceedings, § 208. Such right as the Commission may have to intervene in a Chapter XI proceeding is, therefore, governed by the Rules of Civil Procedure and the general principles governing intervention. We are not here concerned with the refinements of the distinction between intervention, as a matter of right, which the Court of Appeals thought was restricted to cases where the intervenor has a direct pecuniary interest in the litigation, and permissive intervention, a distinction which has been preserved by Rule 24 of the Rules of Civil Procedure. For here the question is not of the Commission's intervention "as of right", but whether the district court abused its discretion in permitting it to intervene.

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable principles which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extends not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent. Sen. Rep. No. 1916, 75th Cong., 3d Sess., p. 31.

Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by paragraph 37 of the General Orders for bankruptcy, authorizes "permissive intervention". It directs that upon timely application any one may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. Cf. *Pennsylvania v. Williams, supra*. If, as we have said, it was the duty of the court to dismiss the Chapter XI proceeding because its maintenance there would defeat the public interest in having any scheme of reorganization of respondent subjected to the scrutiny of the commission, we think it plain that the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it. *The Exchange*, 7 Cranch, 16; *Stanley v. Schwalby*, 147 U. S. 508; *Interstate Commerce Commerce Commission v. Oregon Washington R. Co.*, 288 U. S. 14; *Pennsylvania v. Williams, supra*; *See, Hopkins Saving Ass'n v. Henry*, 296 U. S. 315. Cf. *In re Debs*, 158 U. S. 564; *New York v. New Jersey*, 256 U. S. 296, 307, 308.

This interest of the Commission does not differ from that of a liquidator under a state statutory proceeding who may, in a proper case, intervene in an equity receivership in a federal court to ask the court to relinquish its jurisdiction in favor of the state proceeding. *Pennsylvania v. Williams, supra*. Neither the liquidator nor the state has any personal, financial or pecuniary interest in the property in the custody of the federal court. Their only interest, like that of the commission, is a public one, to maintain the state authority and to secure a liquidation in conformity to state policy. The "claim or defense" of the Commission founded upon this interest has a question of law in common with the main proceeding in the course of which any party or a creditor could challenge the propriety of the court's proceeding under Chapter XI.¹⁰ The claim or defense is

¹⁰ See Note 8 *supra*.

thus within the requirement of Rule 24 and intervention was properly allowed. The Commission was, therefore, a party aggrieved by the court's order refusing to dismiss and was entitled to appeal under §§ 24 and 25 of the Bankruptcy Act. See *Inter-state Commerce Commission v. Oregon-Washington R. Co., super; Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104.

Section 208, applicable to proceedings under Chapter X, gives the Commission, upon filing its notice of appearance, "the right to be heard on all matters arising in such proceeding", but provides that it "may not appeal or file any petition for appeal in any such proceeding." As § 208 has no application to a proceeding under Chapter XI, it is unnecessary to consider the suggestion of the Commission that the limitation of the section is upon appeals to review questions arising in the proceeding from the performance by the Commission of its advisory functions and does not preclude it from appealing to challenge the exercise or non-exercise by the district court of its jurisdiction under Chapter X.

Reversed.

Mr. Justice DOUGLAS did not participate in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U.S.

SUPREME COURT OF THE UNITED STATES.

No. 796.—OCTOBER TERM, 1939.

Securities and Exchange Commission,

Petitioner,

vs.

United States Realty and Improvement Company.

On Writ of Certiorari to
the United States Circuit Court of Appeals
for the Second Circuit.

[May 27, 1940.]

Mr. Justice ROBERTS.

The Chandler Act¹ revised the Bankruptcy Act of 1898, as amended, and, in chapters X, XI, XII, XIII, and XIV, provided for corporate reorganizations, arrangements, real property arrangements, wage earners' plans, and Maritime Commission liens. These, with chapter VIII, authorizing agricultural compositions, chapter IX, dealing with indebtedness of local taxing agencies, chapter XV, added by Act of July 28, 1939, 53 Stat. 1134, and §77, relating to reorganization of interstate railroads, in addition to the seven chapters of the original Act, constitute a comprehensive system for accommodating or liquidating indebtedness in the interest of both debtors and creditors. In chapters X to XIII, inclusive, added by the Chandler Act, the first section states: "The provisions of this chapter shall apply exclusively to proceedings under this chapter," thus evidencing the purpose to make each type of proceeding complete and exclusive of the others.

The proceeding instituted by the respondent, as is conceded, falls precisely within the terms of chapter XI, which deals with arrangements, and confers jurisdiction on the District Court to entertain the cause. But it is said that for the court to exercise that jurisdiction would be so contrary to the unexpressed purpose of Congress that the court should have refused to act. The decision assumes that if Congress had been interrogated as to its intent it would have expressed its will that an arrangement by one having

¹ Act of June 22, 1938, 52 Stat. 840.

2 *See, and Erch. Comm. vs. U. S. Realty and Imp'v't Co.*

such a financial structure as the respondent should not be permitted, and that, in order to prevent such a result, Congress, if it had been prescient, would have so stated. This seems to me to go beyond the construction of the Act as it is written and to amount to an amendment of it. I think that this is not admissible on the ground advanced that to hold otherwise would be to nullify rather than to effectuate the intent of Congress which is thought to pervade the statutory scheme.

Where the words are as plain and unambiguous as they are in chapter XI recourse cannot be had to legislative history or other extraneous aids to construe them in some other sense, to add to, or to subtract from, what is written.²

But if resort to conventional aids to construction were admissible, they seem to me to confirm the statutory right of the respondent to proceed under chapter XI and to preclude a holding that it should have proceeded under chapter X.

Under § 12 of the Bankruptcy Act of 1898 a corporation could propose a composition but, as recourse to bankruptcy, whether for the purpose of liquidation or of proposing a composition, was dependent upon insolvency as defined³ in the statute rather than inability to pay debts as they accrued, a company finding itself in the latter condition could not avail itself of the bankruptcy jurisdiction but had to resort to an equity receivership.

In 1932 the Solicitor General, in a report to the President on the Bankruptcy Act and its administration,⁴ pointed out the difficulties of proposing a composition in bankruptcy and suggested relief of the sort which was ultimately accorded by the adoption of § 77B.

By an Act of March 3, 1933,⁵ there was added to the Act a provision which permitted "any person excepting a corporation", by petition, or by answer in an involuntary proceeding, to assert his insolvency or his inability to meet his debts as they accrued and his desire to effect a composition or an extension of time to pay his

² *Thompson v. United States*, 246 U. S. 547, 551; *Iselin v. United States*, 270 U. S. 245, 250; *United States v. Missouri Pac. R. Co.*, 278 U. S. 269, 277; *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Heisler v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89; *Wallace v. Cotton*, 297 U. S. 229, 237; *Osaka Shosen Line v. United States*, 300 U. S. 98, 101; *Palissi v. Massachusetts*, 308 U. S. 79, 83.

³ *Sen. Doc. 65, 72d Cong., 1st Sess.*

⁴ 47 Stat. 1467, § 74.

debts; and to adjust his indebtedness in that way. Thus an arrangement procedure was provided for individuals who were not insolvent in the bankruptcy sense. The same legislation also provided for agricultural compositions and extensions and for reorganizations of interstate railroads, but Congress did not, at that time, afford any further relief to corporations generally.

By the Act of June 7, 1934,⁵ § 77B was added, permitting the reorganization of a corporation unable to meet its debts as they mature.

When, by the Chandler Act, Congress determined to revise and codify the entire bankruptcy system, it repealed § 12 and § 74, and, in lieu of them, adopted chapter XI, permitting arrangements of unsecured debts by individuals, partnerships, and corporations.⁶ It thus clearly drew a distinction between a reorganization which affects various classes of creditors and stockholders and an arrangement which is merely an extension, adjustment, or accommodation of unsecured claims without disturbing either secured claims or stock interests. Where this simple form of accommodation would suffice, it was not intended that the corporation should have the privilege of a reorganization under chapter X, the successor of § 77B, for it is provided in chapter X (§ 146) that a petition shall not be deemed to be filed in good faith if adequate relief would be obtainable by a debtor's petition under the provisions of chapter XI and further (§ 147) that a petition filed under chapter X improperly because adequate relief can be obtained under chapter XI may be amended to comply with chapter XI and may be proceeded with as if originally filed under the latter. No such provision is found in chapter XI with respect to a case properly falling under chapter X. Obviously the right to proceed under chapter X was deemed a privilege of which a corporation could not avail itself if it could proceed under chapter XI.

The gravamen of petitioner's argument is that Congress intended the more detailed and cumbersome procedure of chapter X to apply whenever securities of the corporation were held by the public whereas chapter XI was intended to apply only in the case of individuals or corporations not having such securities outstanding.

The Act will be searched in vain for any hint of such a distinction. Small corporations are permitted to avail themselves of

⁵ 48 Stat. 911.

⁶ 11 U. S. C. §§ 706, 787.

chapter X if stockholders' or secured creditors' rights are to be affected; large corporations, under the very letter of chapter XI, may avail themselves of its provisions if all they desire to do is to extend or accommodate their unsecured indebtedness. The smallest corporation cannot come in under chapter XI if it desires what has been traditionally known as a reorganization. The largest corporation may proceed under chapter X if it does not desire a reorganization.

The argument of the Commission comes merely to this: That foresight and providence on the part of Congress would have dictated a different line of demarcation between the two chapters and that what Congress should have said in chapter XI was that any debtor which did not have securities outstanding in the hands of the public might file a petition under chapter XI but that all others must file under chapter X.

The legislative history furnishes but the scantiest support for the argument. Indeed it bears quite as strongly against the Commission's contention as in its favor. The only item to which counsel is able to point is a committee report to the House⁷ wherein it is said:

"Section 12 has been recast; such features of section 74 are incorporated as are deemed of value and the combined sections are made Chapter XI of the Act under the title 'Arrangement'. The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under Section 73B but do not require the complex machinery of that section, to resort to the simpler and less expensive though fully adequate relief afforded by Section 12."

It is undoubtedly true that many more small corporations will find chapter XI available than large ones but this does not at all support the Commission's claim that the chapter was not intended to be available to companies having securities in the hands of the public.

On the other hand, testimony before the Congressional Committee was to the effect that large corporations would not come under chapter X if they were seeking merely to adjust their unsecured debts and should go, therefore, under chapter XI.⁸

⁷ H. Rep. 1409, 75th Cong., 1st Sess., pp. 50-51.

⁸ Hearings, Subcommittee Senate Judiciary Committee on H. R. 8916, 75th Cong., 2d Sess., p. 75.

One of the draftsmen of the Chandler Act, in a public exposition,⁹ has said:

"What is the line of demarcation between proceedings under Chapter X and Chapter XI? Without attempting to go into detail, Chapter XI proceedings are intended for the reorganization of corporations with simple debt structures—reorganizations under which the interests of stockholders and secured creditors are not to be modified or readjusted. If secured claims or stock interests are to be changed without the consent of all of the stockholders and secured creditors, proceedings must be 'instituted under Chapter X.'"

That chapters X and XI were not written in ignorance of the distinction between corporations having publicly owned securities and those which have not, is shown by the fact that a special committee's report called attention to this difference and suggested that corporations not having such securities outstanding be permitted to go under the arrangements chapter whereas the first named should be required to file under what is now chapter X.¹⁰ With this suggestion before it Congress adopted a different criterion:

When all is considered it is evident that little support for the Commission's argument can be gained from the legislative history. It is of no avail to urge that it would have been far better for Congress to adopt a different scheme and that the public interest which Congress had in mind in writing chapter X, extends quite as much to a composition such as that proposed in the instant case as to the reorganizations envisaged in chapter XI. These considerations may well be urged upon Congress in support of an amendment of the statute but they can have no weight with a court called upon to apply its plain language.

Equally unavailing is the argument that the present case must belong under chapter X since secured creditors and stockholders must be brought into the reckoning and because one of the requirements of § 366 is that the court must find the arrangement is "fair and equitable and feasible". It is said that this phrase is a term of art, given meaning by our decision in *Northern Pacific R. Co. v. Boyd*, 228 U. S. 482, and that, within that meaning, no fair, equitable, and feasible plan can here be accomplished under chapter XI although it could be under chapter X.

⁹ *Journal of the National Association of Referees in Bankruptcy* (Jan. 1939), p. 72.

¹⁰ Sen. Doc. 268, 74th Cong., 2d Sess., pp. 9-15.

The short answer is that the phrase is used not only in chapter XI and chapter X but also in chapter XII respecting real property arrangements, and in chapter XIII respecting wage earners' plans.¹¹ Obviously the phrase as used in the Chandler Act must be given the connotation appropriate to the section in which it is used.

Another argument put forward is that, as courts of bankruptcy are courts of equity, they may, as a chancellor might in the case of a bill for receivership, find that the balance of convenience requires a refusal to exercise a jurisdiction possessed. I think this is a complete misapplication of the principle that a court of bankruptcy is a court of equity. That has been many times stated but never in connection with the right of a debtor to invoke the remedy provided by Congress in the bankruptcy laws. The legislature has specified who is entitled to the relief provided by the statute and in what circumstances. The court has no power to refuse that relief on the ground that some other relief would better serve the purpose. What is meant by the statement that a court of bankruptcy is a court of equity is that its function is to make an equitable distribution of the estate among the creditors, but the principle has not been applied in the sense that the court may, in its better judgment, refuse to award the relief which Congress has accorded the bankrupt.

No stockholder or creditor, secured or unsecured, has attempted to raise the question of the District Court's jurisdiction under chapter XI. The Securities and Exchange Commission, although charged with no duty by the Act in connection with proceedings under chapter XI, has sought to intervene and, to appeal from a decision by the District Court adverse to the Commission's views. Although the Commission may be permitted to appear in chapter X proceedings, it is expressly provided that it may not appeal from any decision.¹² No analogous provision is found in chapter XI although that chapter does, in certain instances, grant interested parties the right to be heard.¹³

By general order the Rules of Civil Procedure are made applicable in bankruptcy so far as practicable. It is suggested that Rule 24 authorizes the Commission's intervention but a mere reading of

¹¹ See §§ 472 and 656, 11 U. S. C. §§ 872, 1056.

¹² § 208, 11 U. S. C. § 608.

¹³ §§ 334 and 365, 11 U. S. C. §§ 734 and 765.

the rule shows that neither intervention of right, nor permissive intervention, is available to the Commission in this case. The Commission may not intervene as of right under the rule because no statute confers on it an unconditional right to intervene; the Commission has no interest which may be bound by a judgment in the action; and it cannot be adversely affected by the court's decision. It is not entitled to permissive intervention because no statute confers a conditional right to intervene and because it has no claim or defense which will be affected by any decision of law or fact by the court. The cases in which bankruptcy courts have allowed creditors to raise questions of venue or of jurisdiction to adjudicate under the terms of the statute, where the proceeding would affect the creditors' financial interest, are inapposite, as are also equity receivership cases where an official intervenes in order to claim the right, as such official, to take over and administer the property in the possession of the court.

I am of the opinion that the judgment should be affirmed.

The CHIEF Justice and Mr. Justice McREYNOLDS agree with this opinion.